Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

WELLINGTON TRADE INCORPORATED d/b/a CONTAINERHOUSE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Acquisition Regulations, which purport to establish uniform policies and procedures for acquisitions by all executive agencies, and which embody a comprehensive regulatory scheme authorized and adopted pursuant to Congressional mandate, have the force and effect of law in the interpretation of a procurement contract issued by the United States Government.

Whether the Eleventh Circuit Court of Appeals' ruling that the Federal Acquisition Regulations do not have the force and effect of law in the interpretation of a Federal procurement contract constitutes reversible error, in direct conflict with decisions of this Court, as well as decisions of the Court of Appeals for the Federal Circuit, the United States Claims Court, and the administrative boards which address disputes involving such contracts.

RULE 29.1 STATEMENT

All parties to the proceeding in the Court below appear in the caption of the case. With respect to petitioner, there are no parent or subsidiary companies required to be listed pursuant to Rule 29.1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported, and is reprinted in the appendix hereto, App. 1 – App. 25, *infra*.

The opinion of the United States District Court for the Middle District of Florida is in two parts, oral findings of fact and conclusions of law announced on the record, reprinted in the appendix hereto, App. 26 – App. 39, *infra*, and in a subsequent written order, reprinted in the appendix hereto, App. 40 – App. 45, *infra*.

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its opinion and judgment on September 7, 1994. Petitioner timely filed a petition for rehearing on September 28, 1994. The Court of Appeals entered its order denying the petition for rehearing February 1, 1995, and issued its judgment as mandate on February 15, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

The Federal Acquisition Regulations involved in this case will be set out verbatim in the appendix. Their citations are as follows:

48 C.F.R. § 1.101
48 C.F.R. § 1.102
48 C.F.R. § 1.103

48 C.F.R. § 1.401
48 C.F.R. § 1.403
48 C.F.R. § 2.101
48 C.F.R. § 15.406
48 C.F.R. § 46.000
48 C.F.R. § 46.101
48 C.F.R. § 46.401
48 C.F.R. § 52.215-33
48 C.F.R. § 52.246-2
48 C.F.R. § 52.246-15
48 C.F.R. § 52.246-16

STATEMENT OF THE CASE

This is a breach of contract action brought by Petitioner, Wellington Trade, Inc., d/b/a Containerhouse ("Containerhouse"), involving the emergency procurement by the Government of used ocean-going intermodal freight containers to transport ammunition by sea for the sustainment of Operation Desert Storm. The parties negotiated the contract on January 30, 1991, and the Government awarded it that same day.

The central issue in the case is the interpretation of the contract's terms regarding the Government's inspection rights, and more specifically the meaning of the words "final acceptance" contained in Containerhouse's offer in light of the Federal Acquisition Regulations ("FARs"). Containerhouse has contended throughout the course of this litigation that the contract's terms provided for a tender of the containers for a quality assurance inspection by the Government at its repair facility in Jacksonville, Florida, and acceptance to take place at the point of delivery, Anniston, Alabama, with an inspection at Anniston limited to damage in-transit. Those terms

were the subject of specific negotiations prior to entering into the contract, and were consistent with the regulatory scheme.

Pursuant to the contract, Containerhouse purchased, repaired, and shipped the containers from Jacksonville, Florida, to the Anniston Army Depot in Anniston, Alabama. Before shipment, the Government inspected each container for conformity with the contract specifications, and certified that they complied. Upon arrival at Anniston, the containers were inspected for in-transit damage and none was found. Thereafter, the Government refused to pay for the containers, citing deficiencies reportedly discovered in a second inspection for compliance with contract specifications conducted at Anniston Army Depot.

Pursuant to the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, Containerhouse submitted a certified claim for payment to the contracting officer who denied the claim in its entirety. Containerhouse then commenced this action by filing suit in the United States Claims Court on May 20, 1991, asserting a claim for the Government's failure to pay for goods delivered under the contract. Pursuant to a motion to dismiss or transfer filed by the United States based on the ground that the case involved an admiralty contract, the Claims Court transferred the case to the United States District Court for the Middle District of Florida. Thus, jurisdiction in the District Court was founded on 28 U.S.C. § 1333(1). Containerhouse amended its complaint to plead several claims for relief in addition to the claim of non-payment under the contract. The Government counterclaimed.

The District Court conducted a non-jury trial from March 15-22, 1993. At its conclusion, the District Court announced several findings and conclusions on the record, and requested the parties to submit post-trial briefs on the issue of whether the Government constructively terminated the contract for its convenience. App. 26 – App. 39. On June 11, 1993, the District Court entered a written order finding in favor of Containerhouse on its constructive termination for convenience claim, awarding damages in the amount of $322,239.04, and dismissing the remainder of Containerhouse's claims, including the breach of contract claim. App. 40 – App. 45. Judgment entered accordingly. App. 50.

In its decision, the District Court concluded as a matter of law that the parties' contract allowed for a *de novo* inspection of the containers at destination to determine compliance with the contract specifications. App. 28 – App. 30. In reaching this conclusion, the District Court relied on the wording of handwritten language contained in Containerhouse's offer. App. 29. Containerhouse's offer, submitted in response to the Government's Request for Proposals, was conditioned on an inspection of the containers at the city of origin, Jacksonville, and provided:

> Our offer is conditioned on the provision that they be inspected at the city of origin, with *final acceptance* at the destination.
>
> (emphasis supplied).

Although there were significant negotiations regarding the meaning of the words "final acceptance" as shown by the evidence before the District Court, the trial judge ruled that those negotiations were irrelevant in

determining the meaning of the contract's words, as in its opinion the contract's terms were unambiguous. App. 28 – App. 29. The District Court found that the words "final acceptance" meant, as a matter of law, "an acknowledgement . . . that the goods tendered or delivered . . . conform to the requirements of the contract. . . . " App. 29.

The Government timely appealed the judgment on August 10, 1993. Containerhouse timely filed a notice of cross-appeal on August 13, 1993, raising the issue of whether the District Court had committed error in its interpretation of the contract and denying Containerhouse's claim thereon. With respect to this issue, Containerhouse argued that (i) the interpretation of the contract by the District Court was erroneous as a matter of law and (ii) alternatively, that the terms of the contract regarding inspection were ambiguous and, therefore, the District Court improperly interpreted the contract as unambiguous, excluding consideration of parol evidence in determining the meaning of the contract's terms.

The Eleventh Circuit held that the District Court had erred in awarding Containerhouse relief on its constructive termination for convenience claim, and thus reversed that portion of the District Court's judgment. In addition, the Eleventh Circuit affirmed that portion of the District Court's judgment which was entered against Containerhouse on its claim for breach of contract, and remanded to the District Court for further proceedings on the Government's counterclaim. App. 1 – App. 25.

In ruling on Containerhouse's cross-appeal, the Eleventh Circuit held that in interpreting the words "final acceptance" in the contract, it was not bound by the definitions of "acceptance" and "inspection" contained in

the FARs, rejecting the long accepted rule of Government contract law that the FARs have the force and effect of law, all the while acknowledging that if they did, then Containerhouse's argument would have merit.[1] App. 10 – App. 16. The Eleventh Circuit denied Containerhouse's petition for rehearing. App. 46 – App. 47. By holding that the FARs do not have the force and effect of law, the Eleventh Circuit made a fundamental error, and reached a legal conclusion which is in direct conflict with cases decided by this Court, the United States Claims Court, the United States Court of Appeals for the Federal Circuit, and the various administrative boards which regularly apply the FARs when interpreting government contracts.

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[1] 48 C.F.R. § 46.101 defines the term "acceptance" as:

> . . . the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.

48 C.F.R. § 46.101 defines the term "inspection" as:

> . . . examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies), to determine whether they conform to contract requirements.

Thus, inspection, not acceptance, is the act of examining products for contract conformance, a right the Government specifically exercised at origin in this case, and a right the Government was specifically excluded from exercising at destination by the terms of the contract.

ARGUMENT

I. In ruling that the FARs do not have the force and effect of law, and that it is thus not bound by their provisions, the Eleventh Circuit Court of Appeals rendered a decision in conflict with the decisions of this Court, the Federal Circuit Court of Appeals, the Claims Court, and the administrative boards which regularly resolve disputes over government contracts.

The Eleventh Circuit's decision affirming the District Court's judgment on Containerhouse's claim for breach of contract cannot be reconciled with the body of case law governing Federal Government contracts developed by this Court, the Federal Circuit Court of Appeals, the Claims Court, and the administrative boards which regularly resolve disputes involving government contracts. The core of the flawed analysis is reflected in the following extract from the Court's decision, App. 14:

> In discerning the meaning of "final acceptance," we are not bound by the distinction drawn in subpart 46 of the FARs between the terms "acceptance" and "inspection." Under § 46.101 of the FARs, "acceptance" means the bare act of assuming ownership of the goods. 48 C.F.R. § 46.101(1993). "Inspection," by contrast, is defined in the same section as "examining and testing supplies or services . . . to determine whether they conform to contract requirements." *Id. Applying these definitions to the phrase "final acceptance," it is possible to argue the Government was limited to acknowledging ownership of the containers upon arrival at Anniston.*

> *The definitions in section 46.101, however, were not part of the contract between Containerhouse and the Government.* The particular definitions of "acceptance" and "inspection" relied upon by Containerhouse apply only to subpart 46 of the FARs. *Id.* at Section 46.101. These definitions were not incorporated into the contract as were other standard FAR clauses found in subpart 52 of the FARs. Since these definitions were not part of the contract between the parties, they cannot be relied upon to discern the meaning of "final acceptance" as used in the contract.
>
> (Emphasis added).

Thus, the Eleventh Circuit acknowledged that the contract provisions concerning inspection and acceptance could reasonably be interpreted as Containerhouse had argued if the regulatory definitions of "acceptance" and "inspection" applied to this contract. The Court reasoned, however, that those definitions were not "incorporated" into the contract and therefore could not be relied upon to discern the meaning of "final acceptance" as used in the contract. Instead, the Eleventh Circuit looked to other FAR required contract clauses, 52.246-2, 52.246-15 and 52.246-16, which it ruled were specifically incorporated in the contract.[2]

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[2] Although cited in footnote 4 of the Eleventh Circuit's opinion (App. 4), clause 52.246-15, Certificate of Conformance, is not part of the contract. It was specifically deleted by the Government in the applicable RFP of January 24, 1991, and never reinserted. Neither party has ever contended that this clause was part of the contract.

The Eleventh Circuit's decision appears to proceed on the basis that the inspection and acceptance clauses in the contract

The Court's reasoning is irreconcilable with the comprehensive regulatory scheme embodied in the FARs, the *entirety of which* were duly authorized and adopted pursuant to Congressional mandate. Furthermore, it is in direct conflict with the "*Christian* doctrine," derived from the Court of Claims' decision in *G. L. Christian and Associates v. United States*, 160 Ct.Cl. 1, 312 F.2d 418 (1963), *rehearing denied*, 160 Ct.Cl. 58, 320 F.2d 345 (1963), *cert. denied*, 375 U.S. 954, 84 S.Ct. 444 (1963), and approved by the Federal Circuit in *S. J. Amoroso Const. Co. v. United States*, 12 F.3d 1072 (Fed. Cir. 1993). The case law developed under that doctrine establishes that the FARs, and their predecessor regulations consisting of the Armed Services Procurement Regulations, Defense Acquisition Regulations, and the Federal Procurement Regulations, have the force and effect of law *and govern the interpretation of contracts even where not expressly incorporated into the contract.*

Misapprehending this principle, the Eleventh Circuit's analysis refused to give effect to Section 46.401(d) of the FARs. 48 C.F.R. § 46.401(d) provides that:

> (d) If a contract provides for delivery and acceptance at destination and the Government

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source from Part 52 of the FARs. Thus, the Court states in its Opinion at pp. 14-15:

> These definitions were not incorporated into the contract as were other standard FAR clauses found in subpart 52 of the FARs.

In fact, Part 52 merely sets forth standard contract clauses which are mandated by other Parts of the FAR. The specific inspection and acceptance clauses at issue here source from Part 46, the same Part containing the definitions relied upon by Containerhouse.

> inspects the supplies at a place other than the destination, the supplies shall not ordinarily be reinspected at destination, but should be examined for quantity, damage intransit, and possible substitution or fraud.
>
> App. 56.

In rejecting § 46.401(d), the Court of Appeals stated:

> In the present case, however, Section 46.401(d) does not direct that it or any other clause be inserted into the contract between Containerhouse and the Government. Instead, 46.401(d) is a statement of policy guiding the Government's conduct in "ordinary" situations. Since 46.401(d) does not direct the inclusion of any clause into the contract, we find the rule of *G. L. Christian* and *S. J. Amoroso* not applicable in this case. § 46.401(d) did not bar the Government from inspecting the containers a second time at Anniston.
>
> App. 16.

That ruling turns on an overly narrow interpretation of the *Christian* doctrine, and fails to follow the existing body of relevant case law.

In *Winston Bros. Co. v. United States*, 458 F.2d 49 (1972), the Court of Claims held, at p. 52:

> It is by now a basic canon of Government contract interpretation, in which a whole body of distinct, and special contract law has developed, that the Armed Services Procurement Regulations (hereinafter, ASPR) are "law which governs the award and interpretation of contracts as fully as if [they] were made a part thereof. * * * " *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317,

192 Ct.Cl. 176, 182 (1970); *Newport News Shipbuilding & Dry Dock Co. v. United States*, 374 F.2d 516, 179 Ct.Cl. 97 (1967); 32 C.F.R. § 1.102.

In summary, the Eleventh Circuit's refusal to consider the definitions of "acceptance" and "inspection" in § 46.101 of the FARs, in interpreting the meaning of the words "final acceptance" in the parties' contract, violates the fundamental principle that Federal Government contracts are to be awarded, administered and *interpreted* in accordance with the provisions of the FARs. The result is that the Court of Appeals erroneously concluded that the contract here unambiguously provided the Government with the right to conduct a *de novo* inspection of the containers at destination. This Court should grant a writ of certiorari to review the judgment of the Eleventh Circuit and correct that Court's erroneous ruling.

A. The Import of the Federal Acquisition Regulations.

The Federal Acquisition Regulations were promulgated pursuant to the Office of Federal Procurement Policy Act of 1974, Pub. L. 93-400 as amended by Pub. L. 96-83. *See* 48 C.F.R. § 1.102. As regulations duly adopted and authorized by Congress, they have the force and effect of law. *See, Public Utilities Commission of State of California v. United States*, 355 U.S. 534, 542, 78 S.Ct. 446, 452, 2 L.Ed.2d 470, 476-77 (1958) (construing the effect of the Armed Services Procurement Regulations); *Paul v. United States*, 371 U.S. 245, 255, 83 S.Ct. 426, 9 L.Ed.2d 292, 299 (1963) (same).

The purpose of the FARs is explicitly set forth in their introductory provisions. Thus, 48 C.F.R. § 1.101 provides:

> The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies.
>
> App. 51.

Moreover, 48 C.F.R. § 1.103 demonstrates the all-encompassing breadth of the FARs by providing that:

> *The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded.*
>
> App. 52. (Emphasis supplied).[3]

The legislative history of the Office of Federal Procurement Policy Act of 1974 is reported in Senate Report 93-692, 93rd Second Session (1974), reprinted in 1974 USCCAN 4589. In referring to Section 6(a) of the Act, which mandates the development of the FARs (i.e. a uniform procurement system of policies, regulations, procedures and forms) the legislative history states:

> This Section also provides that policies and regulations prescribed by the administrator "shall be followed by executive agencies." *Thus, they will have the same legal force and effect as a statute and any violation would be subject to judicial challenge and review.*
>
> *Id.* at 4600 (Emphasis supplied).

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[3] Part 2, at 48 C.F.R § 2.101 defines "acquisition" as meaning "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease. . . . " App. 53 – App. 54.

A summary review of the FARs shows that they consist of 53 parts covering all aspects of the procurement process. 48 C.F.R. Parts 1-53. The definitions of "acceptance" and "inspection" relied upon by Containerhouse at 48 C.F.R. § 46.101 are contained in Part 46, entitled "Quality Assurance." The scope of Part 46 is defined in 48 C.F.R. § 46.000 to include "inspection, acceptance . . . and other measures associated with quality requirements." App. 54. The contract provisions relied upon by the Eleventh Circuit in reaching its decision are also prescribed in subpart 46. Thus, the Eleventh Circuit took prescribed contract provisions from the context of Part 46, and then denied effect to the balance of Part 46 based on its rejection of the *Christian* doctrine.[4]

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[4] Although the Eleventh Circuit relied upon clauses 52.246-2 and 52.246-16 in concluding that the Government was entitled to a *de novo* inspection at destination on the ground that these clauses were incorporated into the contract, their verbatim use is clearly not required by the FARs. First, exceptions for impracticality were contemplated by the parties, and were specifically allowed by clause 52.246-2(c). Second, the FARs contemplated the possibility of origin inspections for the contractor's benefit, a benefit which was specifically negotiated for, and understood as, running to Containerhouse, notwithstanding the Eleventh Circuit's erroneous ruling that the origin inspection was for the benefit of the Government. Further, 48 C.F.R. §§ 1.401(c) and 1.403 allow for the modification of otherwise mandatory clauses, modifications which, Containerhouse contends, were accomplished here. Finally, the Master Solicitation, which was the procurement vehicle for this purchase, specifically invited "alteration of initial positions . . . [which] may apply to . . . the 'Schedule'." Pursuant to 48 C.F.R. § 15.406(1) and (2), the Schedule includes inspection and acceptance provisions. The Order of precedence clause, found at 48 C.F.R. § 52.215-33, included in the contract at issue, provided that "in

B. Scope of the Christian Doctrine.

The Courts and Administrative Boards which regularly deal with disputes over Government contracts have consistently applied regulatory definitions of terms appearing in the FARs in interpreting contract rights and obligations, even though the definitions were not part of or referred to in the contract, contrary to what the Eleventh Circuit did here. These applications have gone far beyond the factual circumstances confronted by the Court of Claims in *Christian,* and demonstrate the Eleventh Circuit's misapprehension of the scope of that doctrine. As discussed below, the *Christian* doctrine is not limited to reading clauses into contracts where the procurement regulations specifically require those clauses. Rather, it acknowledges that the procurement regulations govern the interpretation of contracts generally, that any contract provisions must be interpreted in the context of the regulatory scheme, and that any conflict between specific contract provisions and the regulatory scheme will be resolved in favor of the latter.

For example, in *SCM Corp. v. United States,* 595 F.2d 595 (1979), the Court of Claims relied on regulatory definitions of the terms "contract modification", "supplemental agreement", and "contracts" to determine the enforceability of an oral settlement agreement. Those definitions were not part of the contract and there was no

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event of any inconsistency in this . . . contract" the Schedule takes precedence over contract clauses. Thus, negotiations regarding inspection and acceptance should take precedence over standard boilerplate contract clauses like those relied upon by the Eleventh Circuit.

regulatory provision explicitly stating that settlement agreements concerning contract claims had to be in writing. Nevertheless, the Court turned to the regulatory scheme as reflected in the definitions referred to and concluded that the regulations contemplated that settlement agreements should be in writing to be enforceable. The case is further significant because it construed the regulatory provisions and the ASPR to be a complete scheme governing contract settlements. By analogy, and contrary to the Eleventh Circuit's interpretation of the scope of Part 46 of the FARs, Part 46 on its face is a complete regulatory scheme governing quality assurance, including specifically the subjects of "inspection, acceptance . . . and other measures associated with quality requirements." 48 C.F.R § 46.000.

In *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680 (Ct.Cl. 1975), the Court looked to the ASPR definition of the term "firm fixed-price contract" in resolving a claim for currency fluctuations asserted by a contractor. In doing so, the Court described the Armed Services Procurement Regulations as " . . . law binding on the parties in a Government contract and [which] govern the interpretation of the contract. . . . " *Id.* at 690.

Similarly, in *Beta Systems, Inc. v. United States*, 838 F.2d 1179 (Fed.Cir. 1988), the Federal Circuit construed an apparently unambiguous contract provision in the context of the regulatory purpose governing such contract provisions as set forth in the Armed Services Procurement Regulations. Specifically, the contract provision called for an economic price adjustment to reflect the cost of inflation tied to the Bureau of Labor statistics index which proved to be inappropriate to the purpose as set

forth in the ASPRs, i.e., to reflect fairly the effects of inflation on the particular types of contract costs incurred. The Court held that the otherwise clear contract provision should be reformed to effect a fair index for price escalation, because that was the purpose of the clause as reflected in the regulation.

In *Chris Berg, Inc. v United States*, 426 F. 2d 314, 192 Ct.Cl. 176 (1970), the Court of Claims held that the contractor was entitled to reaffirmation of a contract to correct a bid mistake because the Armed Services Procurement Regulations provided for such a correction, even though the specific terms of the contract provided for a lower mistaken bid price. Relying on *Christian*, the Court noted:

> The ASPR is law which governs the award and *interpretation* of contracts *as fully as if it were made a part thereof.*
>
> 426 F.2d at 317 (emphasis added).

Likewise, in *Applied Devices Corp. v. United States*, 591 F.2d 635 (1979), the Court of Claims reformed a contract to provide for a realistic cancellation fee to compensate the contractor for the cost of a premature cancellation. There, the Government had issued a contract providing for an arbitrary 3% cancellation fee without attempting to account for realistic cancellation costs. The Court based its decision on the fact that the ASPR evinced an intent that cancellation fees were to reflect reasonable preproduction and other non-recurring costs. Based on the *Christian* doctrine, the Court held that " . . . ASPR requirements are regarded as parts of contracts as fully as if spelled out therein." 591 F.2d at 640.

In *Newport News Shipbuilding & Dry Dock Co. v. United States*, 179 Ct.Cl. 97, 374 F.2d 516 (1967), the Court of Claims held that the ASPR guidelines for determining a reasonable profit were mandatory and had to be applied by the Armed Services Board of Contract Appeals in resolving a dispute concerning the amount of a price adjustment needed to compensate the contractor for the effects of price escalation under long-term contracts. The ASPR guidelines were not referred to in the contract provisions providing for the price escalation adjustment. *See also, Bethlehem Steel Corp. v. United States*, 423 F.2d 300 (Ct.Cl. 1970).

This discussion of case law is illustrative only, and not intended to be exhaustive. Regulatory definitions of terms have routinely been applied when interpreting contract rights and obligations even though the definitions were not part of, or incorporated in, the contract.[5]

The significance of the foregoing authorities should be self-evident in the context of this case. Once the premise of the FARs having the force and effect of law is accepted, Containerhouse's argument regarding contract interpretation follows logically. The term "final acceptance," in the context of this contract, and interpreted in light of the definitions set forth in the FARs of "acceptance" and "inspection" can reasonably be interpreted to mean that the Government had no right to conduct a *de novo* quality assurance inspection at destination. Indeed,

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[5] In addition, literally dozens, and perhaps hundreds, of administrative board decisions are to the same effect. *For example, see C.E.G. Craft Machine Works, Inc.*, ASBCA No. 35167, 90-3 BCA ¶ 23,095.

as set forth above, the Eleventh Circuit acknowledged in its Opinion that the impact of interpreting the term "final acceptance" in light of the definitions in subpart 46 of the FARs is just as Containerhouse has argued:

> Applying these definitions to the phrase "final acceptance," it is possible to argue the Government was limited to acknowledging ownership of the containers upon arrival at Anniston.
>
> App. 14.

Thus, there are only three possible conclusions to be drawn, any of which lead to the same result. The first possibility is that the contract unambiguously allowed the Government to conduct a quality assurance inspection at Jacksonville, with a final inspection at destination for in-transit damage only. The second possibility is that the contract terms on this issue are ambiguous allowing for the consideration of parol evidence which clearly demonstrates the intention of the parties is to the same effect. The final possibility is that the FARs and the contract provisions on this point are in direct conflict. Under that scenario, the FARs control. *See, Moran Bros., Inc. v. United States,* 346 F.2d 590 (Ct.Cl. 1965). Under any of these conclusions, the result is that the Government did not have the right to conduct a *de novo* quality assurance inspection at Anniston and was limited to accepting the goods after an examination for in-transit damage, or pursuant to § 46.401(d), possible substitution or fraud. Since none of those circumstances exist, Containerhouse should have been awarded a judgment in its favor for the full contract amount.

The Eleventh Circuit's holding, therefore, is fundamentally irreconcilable with established authority, and

this Court should grant this petition for a writ of certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-2936

D.C. Docket No. 91-784-CIV-J-10

WELLINGTON TRADE, INC. d/b/a CONTAINERHOUSE,

Plaintiff-Counterdefendant-Appellee, Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(September 7, 1994)

Before COX, Circuit Judge, MORGAN, Senior Circuit Judge, and COLLIER*, District Judge.

PER CURIAM:

In this governmental contract case, the United States appeals a judgment of the district court rendered in favor

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*Honorable Lacey A. Collier, U.S. District Judge for the Northern District of Florida, sitting by designation.

of Wellington Trade d/b/a Containerhouse (Containerhouse). Containerhouse, in turn, cross-appeals the court's ruling the Government did not breach their contract for the sale of ocean freight containers to the Government. We AFFIRM in part and REVERSE in part.

I. BACKGROUND

In the fall of 1990, the Government sought to procure a large quantity of ocean freight containers to transport ammunition overseas for the military. Though the Government needed the containers to support Operation DESERT SHIELD/DESERT STORM, the Government also had to transport ammunition stocks from Europe back to the United States as part of a gradual withdrawal of U.S. troops from Europe. To procure these containers, the Government issued a "Master Solicitation" to companies in late 1990 seeking offers. Containerhouse, with offices in Jacksonville, Florida, was one of the companies receiving this "Request for Proposals" (RFP).

In its original form, the RFP called for offers to lease the Government freight containers meeting Coast Guard specifications for carrying class "A" explosives. This request was later changed to a purchase order. Of particular concern to the present dispute, the RFP contained several provisions regarding the Government's authority to inspect and accept containers. In clauses "E-1" and "E-1.1," the RFP detailed the Government's right to conduct a pre-delivery inspection of the containers[1] and

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[1] As originally worded, clause E-1 read:
At the discretion of the Government, a pre-delivery inspection of the containers leased shall be held at the

accept the containers at the destination.[2] Clause "E-2" incorporated into the RFP several standard clauses in the Federal Acquisition Regulations (FARs) found in the Code of Federal Regulations. These clauses included 48 C.F.R. § 52.246-2 (Inspection of Supplies – Fixed Price)[3],

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contractor's facility by a Government representative and/or U.S. Coast Guard representative. At any time of inspection and delivery, the Government has the right to reject any container which does not meet the specifications in Section C of this RFP.

[2] Clause E-1.1 read in relevant part:

Final inspection and acceptance of the supplies to be furnished hereunder shall be made at destination specified in Subpart A, Box 2 of this RFP by the receiving activity. The receiving activity shall execute acceptance certification, if appropriate, on the applicable inspection and receiving report. . . .

Any damages suffered intransit are the responsibility of the contractor and shall be corrected prior to acceptance. . . .

[3] The clause spelled out in 48 C.F.R. § 52.246-2 states in relevant part:

INSPECTION OF SUPPLIES – FIXED-PRICE

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(f) The government has the right either to reject or to require correction of non-conforming supplies. Supplies are non-conforming when they are defective in

§ 52.246-15 (Certificate of Conformance)[4] and § 52.246-16 (Responsibility for Supplies)[5].

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material or workmanship or otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

[4] The clause set out in 48 C.F.R. § 52.246-15 reads in pertinent part:

CERTIFICATE OF CONFORMANCE

(c) The Government has the right to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor. The Contractor shall in such event promptly replace, correct, or repair the rejected supplies or services at the Contractor's expense. . . .

[5] The clause set out in 48 C.F.R. § 52.246-16 reads in pertinent part:

RESPONSIBILITY FOR SUPPLIES

(a) Title to supplies furnished under this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

On January 24, 1991, the Government faxed to Containerhouse and other potential offerors an amendment to the original RFP. The amendment specified the quantities of containers desired as well as several delivery destinations. It also set a February 7, 1994 delivery date. The amendment further deleted clause E-1.1 from the contract, and modified clause E-1 to read: "At the discretion of the Government, a pre-delivery inspection of the containers may be held. . . . " Otherwise, the amendment left untouched the original provisions concerning inspection and acceptance.

In the early morning hours of January 30, 1991, Mr. Tom Sikes, president of Containerhouse, faxed the Government his offer. He made this offer by writing his own conditions regarding prices and quantities directly on the Government's January 24 amendment. Though Mr. Sikes did not mention any of the FAR clauses governing inspection and acceptance, he wrote the following condition on his offer:

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain with the Contractor until, and shall pass to the Government upon –

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) above shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss or damage to such non-conforming supplies remains with the Contract or until cure or acceptance.

> Our offer is conditioned on the provision that [the containers] be inspected at the city of origin rather than at the destination. For boxes to which the inspector may take exception, we have lined up substantial repair capability to work this weekend and early next week.

At trial, Mr. Sikes testified he added this condition because Containerhouse had no capacity to repair any containers at the destinations specified in the amended RFP (Anniston, Alabama or Lexington, Kentucky). Consequently, he wanted the Government to conduct any inspection for conformance to contract specifications at the city of origin – Jacksonville, Florida.

The Government, however, objected to this condition. After some negotiation, Mr. Sikes changed his offer by deleting the words "rather than" from his condition and inserting "with final acceptance" in their stead. As ultimately submitted, the condition read:

> Our offer is conditioned on the provision that [the containers] be inspected at the city of origin, with final acceptance at the destination.

The Government accepted this wording, and awarded Mr. Sikes and Containerhouse a contract for 134 containers to be delivered to the Anniston Army Depot in Anniston, Alabama. The Government sent Containerhouse a document titled "Award/Contract" specifying the quantity of containers ordered as well as the price to be paid. In addition, this document included the following statement:

"Final Inspection and Acceptance: (See Clause E-1.1)" Clause E-1.1 is the same clause the Government deleted from the RFP in its January 24 amendment. At trial, Mr.

Sikes admitted he overlooked this statement when he received the document and therefore did not protest.

On the day it received the contract, Containerhouse purchased the containers it would ultimately deliver to the Government. As the Government was aware, Containerhouse intended to supply used containers. After purchase, Containerhouse had the containers delivered to a repair facility in Jacksonville. Containerhouse instructed the repair facility to refurbish the containers to contract specifications. The repair facility promptly began repairing the containers according to the Coast Guard specifications included in the original RFP.

Concurrent with purchasing the containers, Containerhouse requested the Government send an inspector to the repair facility as soon as possible. After some delay on its part, the Government sent Henry Huffman of the Defense Contract Management Command to inspect Containerhouse's containers at the Jacksonville repair facility. Over the course of two days, Huffman inspected the containers to determine whether they conformed to contract specifications. Though Huffman was a certified government quality inspector, he apparently had little prior experience examining ocean freight containers. Moreover, Huffman inspected many of the containers at night with a flashlight. Ultimately, Huffman certified on "DOD 250" forms that all 134 containers met the contract specifications.[6]

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[6] A DOD 250 form is a standard government procurement document on which a government agent certifies supplies procured under a contract satisfy the contract requirements. The same DOD 250 form is also used to certify receipt and formal acceptance of contract goods.

On February 11 and 12, trucks bearing the 134 containers arrived at the Anniston depot and were off-loaded by depot personnel. During the unloading, Mr. Sikes obtained signatures on all the DOD 250 forms indicating the containers had been "accepted" by the Government. The people signing these forms had supervised the off-loading and storage of the containers at the base. These people, however, were not certified quality assurance inspectors. After Mr. Sikes departed Anniston on February 12, quality assurance personnel at Anniston thoroughly inspected the containers. After three days of inspections, they concluded none of the containers met contract specifications. Consequently, the Government rejected the containers and returned Containerhouse's invoices unpaid.

In response, Containerhouse argued the containers met contract specifications and the DOD 250 forms indicated the Government had accepted the goods. After negotiations to resolve the dispute fell through, Containerhouse filed a written claim pursuant to the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, with the Government's contracting officer. The contracting officer denied the claim and requested Containerhouse remove the containers from the Anniston depot. Containerhouse refused, and subsequently filed the instant action.

Originally, Containerhouse filed suit in the United States Claims Court. This action was transferred to the District Court for the Middle District of Florida, however, on the basis of admiralty jurisdiction.[7] In its amended

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[7] The contract at issue is deemed a "maritime" contract because it concerns the sale of freight containers used aboard

complaint, Containerhouse alleged claims under the Contract Disputes Act for breach of contract and warranty, estoppel, and termination for the convenience of the government. The Government in turn asserted a counterclaim for the amounts it has expended in moving and storing the containers at Anniston.

After a six-day bench trial, the district court held in favor of the Government on the breach of contract, warranty and estoppel claims. The court interpreted the contract as allowing the Government to conduct quality inspections in both Jacksonville and Anniston. Moreover, the inspection in Jacksonville was for the benefit of the Government; and the Government retained the right to reject the goods after inspection at Anniston. The court concluded the persons signing the DOD 250 forms at Anniston had no authority to do so, and therefore the Government never accepted the containers. Finally, in light of the evidence, the court found Containerhouse had not delivered conforming goods and the Government properly rejected the containers. In its cross-appeal, Containerhouse contests these rulings by the district court.

The court held in favor of Containerhouse, however, on its claim for termination for the convenience. The court noted Mr. Sikes' concern prior to entering into the contract that Containerhouse could not repair any containers in Anniston – a concern the Government knew about at the time. Although the inspection at Jacksonville was for the Government's benefit, the court concluded

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ocean-going ships. Containerhouse did not bring suit under admiralty law, however. Instead, it asserts claims under the Contract Disputes Act.

Containerhouse reasonably relied on the inspector's determination the containers were satisfactory. Thus, the court concluded the Government "was not without fault" in this case, and subsequently entered judgment in Containerhouse's favor for $322,239.04. At the same time, the court dismissed the Government's counterclaim. The Government appeals this judgment and the dismissal of its counterclaim.

II. DISCUSSION

A court's interpretation of a contract is a conclusion of law and hence reviewed *de novo*. *Coflexip & Services, Inc. v. United States*, 961 F.2d 951, 952 (Fed. Cir. 1992); *Int'l Brotherhood of Boilermakers v. Local Lodge D111*, 858 F.2d 1559, 1561 (11th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989).

In its cross-appeal, Containerhouse contests the district court's interpreting the contract to permit the Government to conduct quality inspections both at origin and at destination. In particular, Containerhouse contends the district court erred in not considering extrinsic evidence to explain the phrase "final acceptance" as used in Containerhouse's hand-written condition. Again, the issue of whether a contract's terms are ambiguous and therefore require inquiry into extrinsic evidence is an issue of law subject to *de novo* review. *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 700-701 (11th Cir. 1993). We find the district court properly excluded extrinsic evidence and correctly interpreted the contract regarding the Government's right to inspect the containers prior to acceptance.

When the terms of a contract are unambiguous, extrinsic evidence is not admissible to contradict those terms. *Id.* at 702. Nor is extrinsic evidence admissible initially to prove the existence of an ambiguity. *Id.* Instead, the ambiguity must appear on the face of the contract. *Id.* Furthermore, a contract must be interpreted as a whole to give meaning to all its parts so as not to render some parts meaningless. *Granite Construction Co. v. United States*, 962 F.2d 998, 1003 (Fed. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 965 (1993).

With these principles of contract law in mind, we find no ambiguity regarding the Government's right to inspect the containers at Anniston prior to acceptance. Regardless of whether clause E-1.1 was part of the final contract, the other clauses in section E of the RFP unequivocally reserved to the Government the right to conduct a second quality assurance inspection at Anniston prior to acceptance. FAR clause 52.246-2, adopted by reference into the contract, permits the Government:

> (c) . . . to inspect and test all supplies called for by the contract, to the extent practicable, *at all places and times*, including the period of manufacture, and *in any event before acceptance.*

(emphasis added). This same clause goes on to state:

> Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance.

Another FAR clause adopted by reference, 52.246-15, permits the Government "to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor." Finally, FAR clause 52.246-16 states title to the containers would "pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title."

Read together, these clauses permitted the Government to perform a thorough inspection at Anniston prior to acceptance. Under these provisions, the Government reserved to itself the right to conduct quality inspections at any time prior to formal acceptance. The FAR clauses did not restrict the Government to inspecting for in-transit damage at Anniston. Instead, these clauses envision the Government retaining the right to reject non-conforming containers until the moment of formal acceptance. As the Government did not formally accept the containers at the moment they arrived at Anniston, it retained the right to inspect the containers a second time.[8]

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[8] We arrive at this conclusion without determining whether clause E-1.1 was part of the final contract between the parties. This clause, stating "[f]inal inspection and acceptance of the supplies . . . shall be made at destination . . . ," is consistent with the interpretation discussed above: the Government had the right to conduct a second quality inspection at Anniston. On its face, this clause does not contradict the other terms of the contract. More importantly, the Government did not have to rely on clause E-1.1 in conducting a quality inspection at Anniston. Since the contract clearly spelled out the Government's right to inspect the containers at destination, the issue of whether clause E-1.1 was part of the final contract is irrelevant.

Interpreted in light of these clauses, the condition the containers "be inspected at the city of origin, with final acceptance at the destination" did not prevent the Government from conducting a quality inspection at Anniston. Containerhouse argues "final acceptance" can be interpreted as permitting only an inspection for in-transit damage at destination. Such an interpretation, however, contradicts the plain meaning of the FAR clauses discussed above and would render them inconsequential. Since the contract must be interpreted as a whole, it is unreasonable to interpret "final acceptance" as limiting the Government's right of inspection at destination to in-transit damage only. Since there is no ambiguity on the face of the contract, the district court properly excluded extrinsic evidence on this issue.

Containerhouse maintains the district court's interpretation of "final acceptance" conflicts with certain FAR provisions. In particular, Containerhouse claims this interpretation is inconsistent with the definition of "acceptance" under the FARs. Moreover, a finding that the Government acted properly by inspecting the containers a second time at destination allegedly conflicts with FAR section 46.401(d):

> If a contract provides for delivery and acceptance at destination and the Government inspects the supplies at a place other than destination, the supplies shall not ordinarily be reinspected at destination, but should be examined for quantity, damage in transit, and possible substitution or fraud.

48 C.F.R. § 46.401(d) (1993). Citing *G.L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. C1.), *cert.*

denied, 375 U.S. 954 (1963) and *S.J. Amoroso Const. Co. v. United States*, 26 Cl. Ct. 759 (Cl. Ct. 1992), *aff'd*, 12 F.3d 1072 (Fed. Cir. 1993), Containerhouse states these regulations have the force of law. Consequently, because the Government conducted a quality inspection at Jacksonville, it had no authority to conduct an inspection at Anniston that went beyond checking for in-transit damage. We find these arguments unavailing.

In discerning the meaning of "final acceptance," we are not bound by the distinction drawn in subpart 46 of the FARs between the terms "acceptance" and "inspection." Under section 46.101 of the FARs, "acceptance" means the bare act of assuming ownership of the goods. 48 C.F.R. § 46.101 (1993). "Inspection," by contrast, is defined in the same section as "examining and testing supplies or services . . . to determine whether they conform to contract requirements." *Id.* Applying these definitions to the phrase "final acceptance," it is possible to argue the Government was limited to acknowledging ownership of the containers upon arrival at Anniston.

The definitions in section 46.101, however, were not part of the contract between Containerhouse and the Government. The particular definitions of "acceptance" and "inspection" relied upon by Containerhouse apply only to subpart 46 of the FARs. *Id.* at § 46.101. These definitions were not incorporated into the contract as were other standard FAR clauses found in subpart 52 of the FARs. Since these definitions were not part of the contract between the parties, they cannot be relied upon to discern the meaning of "final acceptance" as used in the contract.

Instead, the proper course is to interpret this term in relation to the other clauses explicitly incorporated into the contract. In light of the other contract provisions governing inspection and acceptance, the phrase "final acceptance" implies a right to inspect the containers and make a final determination on quality prior to formal acceptance.

Containerhouse's argument based on section 46.401(d) does not undermine this conclusion. This section was not incorporated into the contract between the parties. Instead, it represents a "policy" or "procedure" for contracting agencies and contract administrators to follow. 48 C.F.R. § 46.000 (1993). While the Government may have violated its own policy when it conducted a quality assurance inspection in Anniston, it was acting within its contract rights in this particular case.[9].

Containerhouse argues that because the FARs have the "force of law," section 46.401(d) determines the Government's right to inspect the containers regardless of the clear meaning of the contract's terms. In support of this contention, Containerhouse cites *S.J. Amoroso* and *G.L. Christian*, While these cases state the FARs have the "force

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[9] Moreover, it does not appear the Government contravened section 46.401(d) when it inspected the containers at Anniston. This provision states supplies should not "ordinarily" be inspected a second time at destination for conformity with the contract specifications. The record indicates, however, this might not have been the "ordinary" case. Given the rushed procurement and the fact these were used containers purchased to carry explosive ammunition, it is reasonable to assume a second quality inspection by inspectors familiar with ammunition containers was called for.

of law," they are distinguishable from the present case. In both *S.J. Amoroso* and *G.L. Christian*, the regulations expressly required the contracts at issue contain particular standardized clauses. *S.J. Amoroso*, 26 Cl. Ct. at 764; *G.L. Christian*, 312 F.2d at 424. In *G.L. Christian*, the regulations required the inclusion of a termination for convenience clause which was inadvertently left out of the final contract. *G.L. Christian*, 312 F.2d at 424. In *S.J. Amoroso*, the regulations mandated the inclusion of a standard clause incorporating the rules of the Buy American Act. *S.J. Amoroso*, 26 Cl. Ct. at 764. As in *G.L. Christian*, the contract lacked the proper clause. *Id.* at 765. Since the regulations had the force of law and explicitly directed the inclusion of particular clauses, the contracts at issue in both cases had to be read as if they had incorporated those clauses. *Id.* at 767; *G.L. Christian*, 312 F.2d at 427.

In the present case, however, section 46.401(d) does not direct that it or any other clause be inserted into the contract between Containerhouse and the Government. Instead, 46.401(d) is a statement of policy guiding the Government's conduct in "ordinary" situations. Since 46.401(d) does not direct the inclusion of any clause into the contract, we find the rule of *G.L. Christian* and *S.J. Amoroso* not applicable in this case. Section 46.401(d) did not bar the Government from inspecting the containers a second time at Anniston.

Thus, when the Government inspected the containers a second time at Anniston, it acted within its rights. Furthermore, the Government never relinquished its power to reject the containers for non-conformance until it formally accepted them at Anniston. Both at trial and

on appeal, Containerhouse argues the Government formally accepted the containers when Anniston personnel signed the DOD 250 forms. At this point, according to Containerhouse, the Government lost the ability to reject the containers.

The persons signing the forms at Anniston, however, had no authority to sign on behalf of the Government. In particular, they were not quality assurance inspectors authorized to accept goods for the Government. Indeed, the record indicates all four signed under the belief they were merely acknowledging receipt of the containers – not accepting them for the Government. It is incumbent upon a party dealing with a government agent to ascertain the scope of the agent's actual authority. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1, 92 L.Ed. 10 (1947). The Government cannot be bound or estopped on the basis of its agent's conduct when that conduct exceeds the scope of his authority. *United States v. Walcott*, 972 F.2d 323, 325 (11th Cir. 1992); *Brundidge Banking Co. v. Pike County Agric. Stabilization and Conservation Comm.*, 899 F.2d 1154, 1160 (11th Cir. 1990). Here, the Anniston personnel signing the DOD 250 forms plainly exceeded their authority. Consequently, the Government was not bound by these signatures.

Since the Government did not accept the shipment upon arrival, it retained the right to inspect and reject the containers. When the Government's quality assurance personnel inspected the containers, they found none of them met applicable Coast Guard specifications. This finding was later confirmed by the Government's outside expert. The Government, therefore, acted completely within its rights in rejecting the containers after delivery.

Based on these findings, the district court held in favor of the Government on Containerhouse's breach of contract claim. As a result, the court ruled Containerhouse was not entitled to recover the contract price in damages. We affirm this portion of the court's ruling. The court, however, went on to hold Containerhouse was entitled to recover on its alternative claim of termination for convenience. The Government appeals the court's conclusion on this issue.

Initially, the Government attacks Containerhouse's termination for convenience claim by arguing the district court lacked subject matter jurisdiction over this count. Prior to filing suit under the Contract Disputes Act, a contractor must submit any claim in writing to the Government's contracting officer. 41 U.S.C.A. § 605(a) (West 1987). A district court cannot exercise subject matter jurisdiction over a claim brought under the Act unless it has first been submitted to the contracting officer. *Id.* at §§ 605 and 609; *Dawco Construction Co. v. United States*, 930 F.2d 872, 877 (Fed. Cir. 1991). The purpose of this requirement is to give the Government "an opportunity to settle the case or otherwise avoid unnecessary litigation." *SMS Data Products Group, Inc. v. United States*, 19 Cl. Ct. 612, 614 (1990). Citing this statutory requirement, Containerhouse submitted a written claim to the Government on February 28, 1991. Containerhouse thereby gave the contracting officer an opportunity to resolve this case prior to litigation. Consequently, we find the district court properly exercised jurisdiction over this claim.

The contract between the Government and Containerhouse incorporated a standard "termination for convenience" clause. This clause, unique to the world of governmental contracts, states:

> (a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.

48 C.F.R. § 52.249-2 (1993). If the Government terminates for convenience, the clause essentially limits the Government's liability to the contractor's out-of-pocket costs incurred prior to termination. *Id.* By limiting a contractor's damages, such a clause makes it advantageous for the Government to terminate a contract when the contract no longer benefits the Government.

Based in part on the presence of this clause in governmental contracts, courts have developed the related doctrine of "constructive" termination for convenience. *See Maxima Corp. v. United States*, 847 F.2d 1549, 1552-53 (Fed. Cir. 1988). In limited circumstances, courts will retroactively apply the termination for convenience clause of a contract when the Government has acted without legal justification to terminate the contract. *Id.* at 1553. Typically, courts will find a constructive termination

> in situations in which the government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid. Constructively, the clause can justify the government's actions, avoid breach and limit liability.

Torncello v. United States, 681 F.2d 756, 759 (Ct. Cl. 1982). As when it invokes the clause during performance, the Government will normally be liable for only the costs the contractor incurred prior to termination. In this fashion, the Government, avoids liability for a contractor's anticipatory profits – the typical remedy for breach of contract.

Given its remedial effect, the doctrine of constructive termination for convenience is typically invoked by the Government when it is sued by a contractor for an alleged breach of contract. *See id.* at 756. In this case, however, Containerhouse advances the doctrine as an alternate theory of liability. The district court found the Government liable on this theory for the costs Containerhouse incurred in performing the contract. We conclude the district court erred in granting judgment for Containerhouse on this claim.

Though the court did not state the Government had breached the contract, it concluded the Government was "not without fault" in this case. Particularly, the court found Containerhouse reasonably relied on Mr. Huffman's inspection in Jacksonville and his assurance the containers met contract specifications. The court cited the Government's awareness at the outset of Containerhouse's inability to repair the containers in Alabama and thus its desire to have a quality assurance inspection in Jacksonville. Given this knowledge of Containerhouse's predicament, the Government bore some responsibility for Mr. Huffman's ineffective inspection. The court further noted the personnel at Anniston purported to accept the containers and thus certified they met contract specifications. On these grounds, the court held the Government had constructively terminated the contract for its convenience.

This holding, however, is inconsistent with the court's earlier finding the Government had not breached the contract by conducting a second quality inspection and ultimately rejecting the containers. To trigger the doctrine of constructive termination for convenience in a given case, the Government must have acted in some fashion to terminate or curtail the contractor's performance under the contract. *See Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Maxima Corp.*, 847 F.2d at 1553; *Torncello*, 681 F.2d at 759; *see generally*, Tim A. Thomas, Annotation, *Application, to Determination of Government's Liability Under Public Contract, of Doctrine of "Constructive" Invocation of Clause Authorizing Termination for Convenience of Government – Modern Cases*, 104 A.L.R. Fed. 661 (1993) (summarizing relevant case law from the Federal Circuit, Claims Court and Court of Claims regarding the doctrine's application). Here, the Government did not breach the contract or otherwise curtail Containerhouse's performance. As explained above, the Government acted entirely within its contract rights in dealing with Containerhouse. Consequently, no basis exists for finding the Government constructively terminated the contract for its convenience.

Containerhouse advances two grounds supporting a constructive termination in this case. First, Containerhouse claims the Government either intentionally or negligently hindered its performance. Here, Containerhouse relies on the district court's finding the Government bore some fault for Containerhouse's relying on Mr. Huffman's faulty inspection in Jacksonville. Second, Containerhouse contends the circumstances surrounding the contract changed so that at the time of delivery, the

Government no longer needed the containers. For this reason, according to Containerhouse, the Government rejected the containers. We are not persuaded by either of these arguments.

Initially, we agree with the district court that the Government is not entirely blameless in this case. By not properly inspecting the containers in Jacksonville and approving them prior to shipment, the Government mislead Containerhouse. Still, the Government's conduct did not amount to a breach of contract. Nor did the Government curtail or prevent Containerhouse from performing the contract.

Under the terms of the contract, the Government was not obligated to conduct a proper inspection at Jacksonville. FAR clause 52.246-2, incorporated by reference into the contract, states:

> (c) . . . The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in the [sic] this contract.
>
> (k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance.

Since the contract did not specify otherwise, the inspection at Jacksonville was for the Government's benefit. Though Mr. Huffman's failure to properly inspect the containers was regrettable, Containerhouse had no reason under the contract to rely on the Government's initial conclusion regarding quality. Containerhouse remained obligated under the contract to deliver conforming goods

to Anniston regardless of the outcome of the Jacksonville inspection. The Government's determination on quality only became binding upon the Government when it inspected the containers to determine whether to accept or reject the shipment. Given the unequivocal terms of the contract, the Government did not breach the contract or curtail Containerhouse's performance in any fashion.

In ruling on the constructive termination claim, the district court analogize the instant case to *Malone v. United States*. The *Malone* court, however, concluded the Government had "materially breached" the contract at issue. Malone, 849 F.2d at 1445. In *Malone*, the Government contracted with the plaintiff to paint 265 houses. The contract called for the plaintiff to paint an exemplar house to serve as a qualitative benchmark for work on the remaining homes. The contract specifically required the Government to accept the standard of the exemplar house. The Government, however, delayed formally accepting the exemplar and mislead [sic] the contractor into believing the exemplar represented the relevant workmanship standard. When the Government ultimately rejected the exemplar, the plaintiff had already performed 70% of the work under the contract. *Id.* at 1442. On this basis, the Malone court concluded the Government had breached the contract through subterfuge and failing to act in good faith towards the plaintiff. *Id.* at 1445-46.

The Government's contractual obligations in *Malone* contrast sharply with its obligations in the instant case. In *Malone*, the Government was obligated to inspect and accept the workmanship standards of the exemplar. The contract in that case envisioned the plaintiff relying on

the Government's approval of the exemplar house. In the present case, however, the contract provides no basis for Containerhouse's reliance on the government's inspection in Jacksonville. Unlike the agreement in Malone, the contract between the Government and Containerhouse did not envision Containerhouse relying on the inspection in Jacksonville as part of its performance under the contract. For these reasons, we find *Malone* inapposite.

As a second basis for constructive termination, Containerhouse argues the circumstances surrounding the contract changed thereby prompting the Government to terminate the contract by rejecting the containers. In particular, Containerhouse posits the winding down of Operation DESERT STORM in mid-February 1991 reduced the military's need for ammunition containers. As a result, the Government rejected the containers upon arrival at Anniston.

While some courts have reasoned "changed circumstances" are a pre-requisite to upholding an actual or constructive termination for convenience, *see, e.g., Maxima Corp.*, 847 F.2d at 1552-53, changed circumstances alone are not a basis for constructive termination. *See Id; see generally,* Thomas, *supra* (summarizing case law regarding the role of changed circumstances). Even if the circumstances surrounding the contract have changed, the Government must act in some fashion to breach the contract or curtail the contractor's performance for there to be a termination for convenience – constructive or actual.

In essence, Containerhouse contends the Government rejected the containers pretextually. The record, however,

does not bear out this claim. Instead, the record amply supports the district court's conclusion the containers Containerhouse delivered to Anniston were defective. In rejecting the containers for failing to meet contract specifications, the Government was acting within its rights under the contract. Thus, regardless of the Government's need for the containers, there is no basis for a constructive termination for convenience.

III. CONCLUSION

We find the district court erroneously ruled in favor of Containerhouse on its constructive termination for convenience claim. We therefore REVERSE that portion of the court's judgment. We AFFIRM, however, the court's interpretation of the Government's authority under the contract to inspect the containers and its finding the Government properly rejected the containers at Anniston. Since the trial court dismissed the Government's counterclaim on the basis of its holding on the constructive termination claim, the Government's claim must be reinstated and the case remanded for disposition of the counterclaim.

AFFIRMED in part, REVERSED in part, and REMANDED.

[p. 1] UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WELLINGTON TRADE, INC., d/b/a CONTAINERHOUSE, Plaintiff, -vs- UNITED STATES OF AMERICA, Defendant.	CASE NO. 91-784-Civ-J-10 Courtroom Number Two March 22, 1993 9:30 a.m.

TRANSCRIPT OF NON-JURY TRIAL PROCEEDINGS
before
THE HONORABLE WM. TERRELL HODGES
United States District Judge

APPEARANCES:

For the Plaintiff: CHARLES D. TOBIN, Esquire
TIMOTHY J. CONNERS, Esquire
76 South Laura Street,
Suite 1600
Jacksonville, Florida 32202

For the Defendant: BRIAN M. KANE, Esquire
Assistant United States Attorney
Post Office Box 600
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-and-
ALAN W. MENDELSOHN, Esquire
Associate Counsel (Procurement)
Military Sealift Command
Building 210,
Washington Navy Yard
Washington, D.C. 20398-5100

Also Present: THOMAS WELLINGTON SIKES

Court Reporter: MILDRED W. SHEALY, RPR
Post Office Box 591
Jacksonville, Florida 32201

(Proceedings reported by microprocessor stenography; transcript prepared by computer.)

* * *

[p. 4] transcript.)

THE COURT: Who speaks for the government?

MR. KANE: Mr. Mendelsohn, Your Honor.

THE COURT: All right.

(The closing argument on behalf of the government was reported in full but not made a part of this transcript.)

THE COURT: All right. Thank you, counsel. Let's take a ten-minute break, after which, Mr. Tobin, I'll allow you ten additional minutes, but no more, if you wish for rebuttal. But for now, we'll take a ten-minute break.

(Recess, 11:20 a.m.)

(Reconvened, 11:30 a.m.)

(The rebuttal closing argument on behalf of the plaintiff was reported in full but not made a part of this transcript.)

THE COURT: Thank you, counsel. Let me say at the outset of my remarks that I appreciate the professionalism and the ability with which this case has been tried

and presented on both sides. And because of the thoroughness of your presentation and your arguments, I think I can safely say that the issues are clearly defined. And while they are not simple in their resolution, I will never be in a better position than I am at this moment to decide at least some of them. So it's my intention to state some oral findings and [p. 5] conclusions at this time on the record with respect to what I perceive to be the central issues in the case, both factually and legally or, as is so often the case, mixed questions of fact and law.

I've already stated at the conclusion of the evidence on Friday what I had perceived the issues to be. And it would appear from your arguments this morning that there is at least no substantial disagreement with respect to what the issues are. The disagreement, of course, exists with respect to how the issues should be resolved.

And the first one is what was the contract of the parties with specific reference to the government's right of inspection prior to acceptance. Or stated somewhat more specifically, was the government's right of inspection at destination rather than at origin limited as claimed by the plaintiff to inspection for damage in transit and not for quality assurance or compliance with the contract.

On that issue, the exhibits which I think have the most importance are Plaintiff's Exhibit 9 and Defendant's Exhibit 4. Plaintiff's Exhibit 9 is the plaintiff's corrected or clarified proposal or his best and final offer, and Defendant's Exhibit 4 is the government's award of contract or, in effect, acceptance of the plaintiff's offer.

And on this issue, I must say I'm inclined to agree with the government's position. First of all, to even [p. 6]

consider oral testimony concerning what the negotiations of the parties might have been, it's necessary to find some ambiguity or uncertainty in the handling of the written contract documents themselves. And to me, there is no such ambiguity, even in the plaintiff's final proposal, Plaintiff's Exhibit No. 9.

The operative language of that proposal is, quote, "Our offer is conditioned on the provision that they," referring to the contract goods, "be inspected at the city of origin." Originally at that point the proposal was "rather than at destination." The term "rather than" was stricken and the phrase "with final acceptance at destination" inserted.

"Final acceptance," of course, is a term of art, which means an acknowledgment by the contracting parties that the goods tendered or delivered pursuant to the contract conform to the requirements of the contract or the specifications of the contract. And that, as I think the government rightly argues, necessarily implies a reasonable opportunity to make a reasonable inspection of the goods prior to acceptance. That is to say, something more than a mere acknowledgment that goods purporting to comply with the contract were received at the point of destination.

But beyond that, even if there was some uncertainty about the meaning of that language, the government's [p. 7] position is also fortified, I think, by the award of contract, Defendant's Exhibit 4, which in the typewritten attachment forming a part of that document. And in a rather clear and conspicuous manner, as distinguished

from hidden fine or small print, the provision was inserted, "Final inspection and Acceptance. See clause E-1.1," which is the much-discussed clause providing for inspection at the point of destination.

As indicated by the question I asked of Mr. Tobin at the outset of the argument this morning, it seems to me analytically that if that provision is deemed to be inconsistent with the plaintiff's final proposal, Plaintiff's Exhibit No. 9, then it must be treated in law as a rejection and a counteroffer which the plaintiff then is deemed to have accepted by undertaking performance or attempted performance, substantial performance, of the remaining terms of the contract, which clearly he did. And as counsel says, Mr. Sikes candidly admitted that he simply overlooked or failed to read or did not see that provision in the government's award of contract at the time it was made.

So on the first issue, as I see it and as I stated it the other day, I am constrained to find for the government and conclude or find in fact and conclude in law that the contract of the parties did in this instance contemplate and [p. 8] provide for a double or redundant inspection with respect to quality assurance or compliance of the goods with the contract, one to be made at the point of origin, and the other to be made preliminarily to acceptance at the point of destination.

I might say that that is also entirely consistent in this case with the testimony of Colonel Gore, which I credit, that it was at his insistence that the contract provide precisely for what might otherwise be regarded as a repetitive or redundant inspection.

That brings me then to the second issue, and that is, regardless of the government's rights concerning inspection at the point of destination, were the goods, or in this instance the containers, nevertheless accepted, quote, unquote, by authorized representatives of the United States at the Anniston Army Depot.

I indicated on Friday, I think, a clear impression with respect to that issue that there was no effective acceptance at Anniston, because the persons who signed in the middle blocks on the DD250 form, that is, Plaintiff's Exhibit No. 5, Mr. Benn, Mr. Smith, Mr. Ballard, I believe – not Mr. Ballard. Mr. Benn, Mr. Smith, and Mr. Baker – simply lacked the authority to accept the goods for the United States.

And there was nothing in the behavior of the government [p. 9] in relation to the signature of those employees on the DD250 forms which should be held to either estop the government or to create an apparent agency in any of those employees to purport to commit the government under those circumstances, particularly in the absence of any further inspection, given their obvious job duties, which were unrelated to quality assurance inspections or the like at Anniston, and the fact that Mr. Sikes secured their signatures in the absence of any opportunity on the part of any of those people to make any kind of an inspection, let alone to certify, as their signatures would purport to do, that the containers conformed to contract requirements or contract specifications, when there's no showing or indication whatsoever that any of those people had any idea what the contract requirements or specifications were.

Those findings and conclusions I think substantially moot the third issue that I stated, namely, whether as claimed by the United States there were misrepresentations made by the plaintiff in the contract proposal regarding the origin of the containers, as well as other matters which would render the contract either void or voidable at the option of the United States.

Even so, in the event there are ever any subsequent proceedings in the case which might in some way hinge upon or revitalize that issue, it would be my finding and [p. 10] conclusions that there were no willfully material, or no material willful misrepresentations made by the plaintiff in this respect.

First of all, the question of Ms. Lyle's position with the corporate plaintiff or the experience of the corporate plaintiff – and I'm emphasizing the word "corporate" in both of those statements. The experience of the corporate plaintiff in performing earlier government contracts, it seems to me was neither willful nor material. By her testimony here, Ms. Lyle clearly established that she is the second person in command, if you will, of the corporate plaintiff in its day-to-day operations, regardless of her technical position or lack of a technical position as a corporate officer.

And with respect to the experience of the plaintiff in performing other government contracts, Mr. Sikes has credibly testified that he is and always has been the sole stockholder of the corporate plaintiff, such that it's not unreasonable in the circumstances for him to have listed

and for the government to be interested in his own personal history with respect to his prior contractual dealings with the United States.

With regard to the matter of the origin of the containers, if I now correctly understand the application to the case of the so-called Buy American Act or the Trade [p. 11] Agreements Act of 1979 – and I think I do, with the helpful arguments given this morning, now understand the operation and application of those statutes – it was important or at least material for the government to know in the proposal documents of the plaintiff whether and to what extent the goods to be delivered in compliance with the contract, should award be made to the plaintiff, were or were not of foreign origin. And, if so, what particular countries were represented or would be represented as the point of manufacture of the containers to be supplied.

However, there's also evidence that there was at least some confusion on the part of Mr. Robinette, the government's representative, with respect to discussions had with the plaintiff concerning that particular provision of the proposal documents. Also some confusion on the part of the plaintiff himself, according to his own testimony, with respect to the manner in which, quote, foreign origin, close quote, is to be determined where components, for example, may be of foreign manufacture.

But in any event, as it turns out, if my calculations are correct, only 11 of the 134 containers involved in the case, as the contract was ultimately attempted to be performed, or some 8.2 percent of the goods would have been subject to rejection or noncompliance with the Trade

Agreements Act of 1979. So that when all of those [p. 12] considerations are taken into account, in coalescence with each other, it's my firm impression and my finding of fact, as well as my conclusion of law, that there was no willful or material misrepresentation by the plaintiff. It was not willful in the sense that there was no deliberate effort to deceive, given all of the discussions that Mr. Sikes had with Mr. Robinette. And it was not material in the sense that, as it turned out, the foreign origin of the containers would have infected, for lack of a better word, the eligibility or conformity of the goods in the main, involving only 11 or 8.2 percent of the goods.

Stated another way, if only 8.2 percent of the containers were defective, it would not constitute in my view a material breach of the contract. So by analogy, if only 8.2 percent of the goods were subject to a possible material misrepresentation, it does not seem to me that in terms of the contract as a whole that that would be a material deception.

The next issue is whether or not the containers were in fact defective and, if so, to what extent. The evidence on this issue, of course, is mixed, given the inspection and approval on the part of Mr. Huffman who was, as government counsel emphasized during argument, acting in behalf of the United States, and the evidence of the government concerning the inspections that were carried out at Anniston, both by [p. 13] the government's quality assurance personnel there and by Captain Osnes, the independent expert employed by the United States to conduct an inspection.

There are some discrepancies in the government's evidence, as pointed out by plaintiff's counsel, with respect to what the findings of those various inspections were with respect to specific containers. But it's my firm impression and therefore my finding that the evidence preponderates when considered in its totality in favor of a finding that the containers were in fact defective in relation to the requirements of the contract and did not conform to the specifications of the contract.

And that is, therefore, my finding and conclusion with respect to that issue.

That brings me then to what I stated before and what I still believe to be the fifth or next issue in the case. And that is whether, as the plaintiff has clearly prayed in the issue pleadings and in the pretrial stipulation in this case – whether the plaintiff is entitled, if not to damages in the form of the full contract price for breach of contract, is nevertheless under the circumstances entitled to an alternative remedy in this case, such as an invocation of the clause or provision in the contract documents or applicable regulations by the Court terminating the contract for the convenience of the government.

[p. 14] And on that issue I am at the moment only in a position to state an impression as distinguished from a final factual determination or legal conclusion. But my impression at the moment with respect to that issue is to resolve it in favor of the plaintiff. I have found obviously that the plaintiff failed to perform the contract in accordance with its terms by delivering containers which did

not conform to contract specifications and that the government did have the right to inspect and therefore reject, as it did, at the point of destination.

But it does seem to me that the government, or its representatives in this case, are not without fault. First of all, Mr. Huffman, without any apparent inducement or persuasion by the plaintiff, as the government contends was exercised with respect to the employees at Anniston who purported to accept the goods, for example – Mr. Huffman inspected the goods at the point of origin where the plaintiff did have repair capability that had been stressed in his conversations admittedly with Mr. Robinette and approved the goods for shipment, and the plaintiff relied upon that, reasonably so, even though, to be sure, that inspection was for the benefit of the government, as counsel argues, rather than for the benefit of the plaintiff. As a strict matter of contract law, it was certainly reasonable for the plaintiff to rely upon that inspection and ship the [p. 15] goods to Anniston.

Legally, in the way I've resolved the case, he still remained at risk that the goods would be rejected upon final inspection and would, therefore, have to incur additional costs and expense of, among other things, perhaps arranging for repair at that point. But it seems to me his reliance upon Mr. Huffman's inspection was entirely reasonable under the circumstances. And there's also his testimony, which I have found to be legally inconsequential in terms of the government's right to make final inspection – but his testimony concerning his conversations with Mr. Robinette, which significantly are not disputed by Mr. Robinette, concerning his intentions in

having the containers repaired before delivery in Jacksonville, to say nothing of the fact that when the goods then arrived at Anniston, although it resulted from, in large measure, his own insistence, the fact is that government employees at the Army Depot in Anniston purported to accept those goods in behalf of the United States.

And when all of those circumstances are considered, together with the exigencies which surrounded the making of this contract in the first place – the rush of negotiations, which to some extent is relied upon by both sides, in the heat of trying to supply goods which were thought, at least by some, to be needed for the support of [p. 16] the military effort in DESERT STORM, as well as other circumstances argued by plaintiff's counsel concerning the question whether or not these containers were in fact needed in Anniston, all of these do lead me to conclude that if the Court in fact has the authority under the decisions to invoke the termination for convenience by the government clause in the contract, and if upon my further examination of that specific provision of the governing regulations and/or the contract, its terms within any measure fit the circumstances I've just described, then it would be my intention to grant that form of alternative relief.

That then involves the question of – if so, if that relief is granted, the precise elements of that remedy and whether I can proceed to fashion and impose that remedy in the form of judgment or whether, as initially suggested at least by government counsel on Friday, it would require some form of remand to the contracting officer – those are issues of fact and law that I'm unable to resolve as I sit here this morning and will, therefore, take the case

under submission for further study and review concerning those issues.

Finally, with regard to the government's entitlement, if any, to relief on the counterclaim, I will simply carry that with the case until I've resolved the last issue just stated. Because obviously the government's entitlement to [p. 17] any relief on the counterclaim will hinge, at least in part, on my resolution of the issue of the plaintiff's entitlement to any form of relief.

So I will take the case under submission to the extent that I've just stated, and I will invite the plaintiff, Mr. Tobin, within fifteen days to submit a post-trial or supplemental memo, limited to and concentrating upon the alternative remedy of termination for convenience of the government in this case. What the specific contract provisions are that govern this situation or govern, I should say, that possible remedy, and what the elements of that remedy are, what the evidence is with respect to each of those elements of relief, according to your view of the evidence, and whether the Court is empowered, once those determinations have been made, to fashion such relief in the form of a final judgment or whether some further proceedings by or before the contracting officer or some other administrative body in the Executive Branch is necessary.

And I will allow the government fifteen days after receipt of the plaintiff's memo on those points to respond or reply in like fashion. And once those memos have been received, I will then take the case under submission for further decision by the entry of either a memorandum opinion or additional findings of fact and conclusions of

law supplementing those that I have made here on the bench [p. 18] today.

Is there anything else to be taken up in the case today as far as the plaintiff is concerned, Mr. Tobin?

MR. TOBIN: No, Your Honor, there is not. Thank you.

THE COURT: For the defense?

MR. MENDELSOHN: No, Your Honor. Thank you.

THE COURT: All right. Thanks again, counsel, for your skill in presenting this matter. We'll now be in recess.

(And thus the proceeding ended at 12:17 p.m.)

[p. 19] CERTIFICATE

STATE OF FLORIDA)

)

COUNTY OF DUVAL)

I hereby certify that to the best of my knowledge and belief the foregoing transcript is a true and correct transcription of my stenographic notes and electronic tape recording taken at the time and place specified herein.

WITNESS my signature and official seal at Jacksonville, Duval County, Florida, this 23rd day of March A.D., 1993.

/s/ Mildred W. Shealy
MILDRED W. SHEALY, R.P.R.,
Official Court Reporter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WELLINGTON TRADE, INC.,

Plaintiff,

-vs-

UNITED STATES OF AMERICA

Defendant.
_____/

CASE NO. 91-784-Civ-J-10

(Filed June 11, 1993)

ORDER

This case was tried before me without a jury during the period March 15-22, 1993. At the end of the trial I announced my findings and conclusions on the record. Except for one issue, on which ruling was reserved, I essentially found for the Government. More specifically, I found that the contract, properly interpreted, allowed the Government to make a quality assurance or conformity inspection at the point of destination (Anniston Army Depot) as well as the point of origin (Jacksonville). I further found that, regardless of the Government's right of inspection, the containers were not "accepted" at Anniston despite the signatures of the workers who purported to accept them, i.e., the workers were not authorized to accept anything. I further found (contrary to the Government's assertion) that there were no *willful* misrepresentations of *material* facts by the Plaintiff in its contract proposal (regarding the national origin of the

goods or the Plaintiff's prior history in performing Government contracts). I further found that the containers were defective, did not meet the contractual specifications, and were therefore properly rejected by the United States.

It follows from those findings and conclusions that the Plaintiff is not entitled to recover the contract price under the contract. There was an alternative claim, however, that the Court should declare a constructive termination of the contract for the convenience of the Government, all in accordance with a clause to that effect in Government procurement contracts. The parties were given 30 days (15 days each) to brief this remaining issue. The briefs (Docs. 91, 93, & 96) have been filed.

The Government argues that the court lacks subject matter jurisdiction over the constructive termination claim because the Plaintiff did not submit this specific claim to the Contracting Officer. *See* 41 U.S.C. § 605(a). The requirement of a written submission is to "provide the Government with an opportunity to settle the case or otherwise avoid unnecessary litigation." *SMS Data Products Group v. United States*, 19 Cl.Ct. 612, 614 (1990). The Plaintiff's written submission (Defendant's Trial Exhibit No. 10) gave the Government such an opportunity. Furthermore, the parties have stipulated in the pretrial stipulation that the Court has admiralty jurisdiction over the case. The Court has jurisdiction over the case.

I now adopt the preliminary findings of fact and conclusions of law which I stated on the record with regard to constructive termination. This case is analogous to that of *Malone v. United States*, 849 F.2d 1441 (Fed.Cir.

1988). In *Malone* the termination for the convenience of the Government clause was invoked where the contractor reasonably relied upon a Government inspection. The court found that the Government's actions in hindering the contractor's performance materially breached the contract. *Id.* at 1445-46. Where the Government materially breaches the contract, and it could have resorted to the convenience-termination clause, damages are to be determined in accordance with that clause. *Inland Container, Inc. v. United States*, 512 F.2d 1073, 1080-82 (Ct.Cl. 1975). Accordingly, I will proceed to the "judicial inquest into damages under a set of rules written for an administrative negotiation." *Id.* at 1081.

The termination for the convenience of the Government clause provides that payment shall be made for:

> The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto . . . [and profit, unless] it appears that the Contractor would have sustained a loss on the entire contract had it been completed, [in which case] the Contracting Officer shall allow no profit under this subdivision [] and shall reduce the settlement to reflect the indicated rate of loss.

48 C.F.R. § 52.249-2.

The Court finds that the following are the reasonable costs incurred in the performance of the work:

1. $207,000.00 – purchase of containers.
2. 39,794.00 – container repairs.
3. 3,406.00 – transportation to Southeastern.
4. 30,492.00 – transportation to Anniston.

The total costs then were $280,692.00. The Plaintiff introduced no evidence as to its overhead costs. Accordingly, none will be awarded. The Government contends that the Plaintiff would have expended an additional $259,544.40 in remedial expenses had the contract been satisfactorily performed; and, therefore, based on a contract price of $489,416.00, the Plaintiff would have lost $50,820.40. In support of this contention the Government introduced at trial a report (Defendant's Exhibit 16/A) prepared by National Cargo Bureau, Inc. The report shows that the Plaintiff's remedial material expenses in completing the contract would have been $113,191.15 and that it would have expended 5,820.15 hours in additional labor costs. No evidence was submitted on the applicable wage rate and the Government has not explained how it arrived at the $259,544.40 figure. Without a proven wage rate, it is at least possible that the Plaintiff could have made a profit.[1] Accordingly, the Plaintiff would be entitled to a profit on the $280,692.00 it expended. Again, however, no evidence was introduced on what the profit should be. Therefore, none will be awarded.

The Plaintiff has also prayed for prejudgment interest, which is allowable at the rate 6.21% from 28 February

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[1] It has been shown that the Plaintiff expended $280,692.00 in direct expenses. If it had expended an additional $113,191.15 in remedial material expenses, the subtotal would be $393,883.15. The contract price was $489,416.00. The difference between $489,416.00 and $393,883.15 is $95,532.85. Accordingly, using the 5,820.15 hour figure, if the Plaintiff's average wage rate was less than $16.41/hr, it would have made a profit.

This does not take into account any overhead expenses, since no evidence of such was introduced by either party.

1991. *See* 41 U.S.C. § 611. By compounding the prejudgment interest annually, the award is increased to $322,239.04.[2]

Because the termination for the convenience of the Government clause has been invoked, it follows that the Government's counterclaim is due to be dismissed.

Upon due consideration:

1. The Plaintiff is awarded $322,239.04 in damages, and prejudgment interest, through the invocation of the termination for the convenience of the Government clause of the contract.

2. The Plaintiff shall take nothing with regard to all of its other claims and they are hereby dismissed with prejudice.

3. The Government's counterclaim is hereby dismissed with prejudice.

4. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

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[2] 28 Feb 91 - 28 Feb 92: 1.0621 * $280,692.00 = $298,122.97
28 Feb 92 - 27 Feb 93: 1.0621 * $298,122.97 = $316,636.40
27 Feb 93 - 11 Jun 93: 0.0621 * $316,636.40 = $19,663.12
$19,663.12/365 = $53.87/day
$53.87/day * 104 days = $5,602.64
$316,636.40 + 5,602.64 = $322,239.04

DONE AND ORDERED at Jacksonville, Florida, this 11th day of June, 1993.

/s/ Wm. Terrell Hodges
UNITED STATES
DISTRICT JUDGE

Copy to counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2936

WELLINGTON TRADE, INC., d/b/a CONTAINER-HOUSE,

Plaintiff-Counterdefendant-
Appellee, Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-
Appellant, Cross-Appellee.

(Filed Feb. 1, 1995)

On Appeal from the United States District
Court for the Middle District of Florida

ON PETITION FOR REHEARING

BEFORE: COX, Circuit Judge, MORGAN, Senior Circuit Judge, and COLLIER*, District Judge.

PER CURIAM:

The petition for rehearing filed by appellee Wellington Trade, Inc. is denied.

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* Honorable Lacey A. Collier, U. S. District Judge for the Northern District of Florida, sitting by designation.

ENTERED FOR THE COURT:

/s/ Emmitt Ripley Cox
United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-2936

D. C. Docket No. 91-784-CIV-J-10

WELLINGTON TRADE, INC.,
d/b/a/ CONTAINERHOUSE,

Plaintiff-Counterdefendant-
Appellee, Cross-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Counterclaimant-
Appellant, Cross-Appellee.

(Filed Sept. 7, 1994)

Appeals from the United States District Court
for the Middle District of Florida

Before COX, Circuit Judge, MORGAN, Senior Circuit Judge, and COLLIER*, District Judge

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

---

* Honorable Lacey A. Collier, U. S. District Judge for the Northern District of Florida, sitting by designation.

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby AFFIRMED in part and REVERSED in part; and that these causes be and the same are hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party shall bear their own costs on appeal.

Entered: September 7, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: FEB 15 1995

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

Middle DISTRICT OF Florida

Wellington Trade, Inc.

V.

USA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91-784-Civ-J-10

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the court's order entered, June 11, 1993, plaintiff is awarded $322,239.04 in damages, and prejudgment interest, through the invocation of the termination for the convenience of the Government clause of the contract. Plaintiff shall take nothing with regard to all of its other claims and they are hereby dismissed with prejudice. The Government's counterclaim is hereby dismissed with prejudice.

June 11,1993
Date

David L. Edwards
Clerk

/s/ Marlene Kerley
(By) Deputy Clerk

48 C.F.R. Section 1.101, 1.102, and 1.103

Subpart 1.1 – Purpose, Authority, Issuance

1.101 Purpose.

The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986]

1.102 Authority.

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy (OFPP) Act of 1974 (Pub. L. 93-400), as amended by Pub. L. 96-83, and OFPP Policy Letter 85-1. Federal Acquisition Regulations System, dated August 19, 1985.

(b) The FAR is prepared, issued, and maintained, and the FAR System is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration, under their several statutory authorities.

[48 FR 42103, Sept. 19, 1983, as amended at 51 FR 27116, July 29, 1986]

1.103 Applicability.

The FAR applies to all acquisitions as defined in part 2 of the FAR, except where expressly excluded.

* * *

48 C.F.R. Section 1.401

1.401 Definition.

Deviation means any one or combination of the following:

(a) The issuance or use of a policy, procedure, solicitation provision (see definition in 52.101(a)), contract clause (see definition in 52.101(a)), method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the FAR.

(b) The omission of any solicitation provision or contract clause when its prescription requires its use.

(c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definitions of *modification* and *alternate* in 52.101(a)).

(d) The use of a solicitation provision or contract clause prescribed by the FAR on a *substantially as follows* or *substantially the same* as basis (see definitions in 52.1001(a)), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject matter in the FAR.

(e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.

(f) The issuance of policies or procedures that govern the contracting process or otherwise control contracting relationships that are not incorporated into agency acquisition regulations in accordance with 1.301(a).

* * *

48 C.F.R. Section 1.403

1.403 Individual deviations.

Individual deviations affect only one contracting action, and, unless 1.405(e) is applicable, may be authorized by agency heads or their designees. The justification and agency approval shall be documented in the contract file and a copy of the approved deviation shall be furnished to the FAR Secretariat through a central agency control point.

* * *

48 C.F.R. Section 2.101

Subpart 2.1 – Definitions

2.101 Definitions.

As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.

Acquisition means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created,

developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

* * *

48 C.F.R. Section 46.000 and 46.101

46.000 Scope of part.

This part prescribes policies and procedures to ensure that supplies and services acquired under Government contract conform to the contract's quality and quantity requirements. Included are inspection, acceptance, warranty and other measures associated with quality requirements.

Subpart 46.1 – General

46.101 Definitions.

Acceptance, as used in this part, means the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or approves specific services rendered as partial or complete performance of the contract.

Contract quality requirements, means the technical requirements in the contract relating to the quality of the product or service and those contract clauses prescribing inspection, and other quality controls incumbent on the

contractor, to assure that the product or service conforms to the contractual requirements.

Government contract quality assurance, means the various functions, including inspection, performed by the Government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity.

Inspection, means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

Off-the-shelf item, means an item produced and placed in stock by a contractor, or stocked by a distributor, before receiving orders or contracts for its sale. The item may be commercial or produced to military or Federal specifications or description.

Subcontractor (see 44.101).

Testing, means that element of inspection that determines the properties or elements, including functional operation of supplies or their components, by the application of established scientific principles and procedures.

* * *

48 C.F.R. Section 46.401

Subpart 46.4 – Government Contract Quality Assurance

46.401 General.

(a) Government contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine

that the supplies or services conform to contract requirements.

(b) Each contract shall designate the place or places where the Government reserves the right to perform quality assurance.

(c) If the contract provides for performance of Government quality assurance at source, the place or places of performance may not be changed without the authorization of the contracting officer.

(d) If a contract provides for delivery and acceptance at destination and the Government inspects the supplies at a place other than destination, the supplies shall not ordinarily be reinspected at destination, but should be examined for quantity, damage in transit, and possible substitution or fraud.

(e) Government inspection shall be performed by or under the direction or supervision of Government personnel.

(f) Government inspection shall be documented on an inspection or receiving report form or commercial shipping document/packing list, under agency procedures (see subpart 46.6).

(g) Agencies may prescribe the use of inspection approval or disapproval stamps to identify and control supplies and material that have been inspected for conformance with contract quality requirements.

* * *

52.246-2 Inspection of Supplies – Fixed-Price.

As prescribed in 46.302, insert the following clause:

INSPECTION OF SUPPLIES –
FIXED-PRICE (APR 1984)

(a) Definition. *Supplies*, as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The

Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises; *provided*, that in case of rejection, the Government shall not be liable for any reduction in the value of inspection or test samples.

(e)(1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) The Contracting Officer may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i)(1) If this contract provides for the performance of Government quality assurance at source, and if requested by the Government, the Contractor shall furnish advance notification of the time (i) when Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract and (ii) when the supplies will be ready for Government inspection.

(2) The Government's request shall specify the period and method of the advance notification and the Government representative to whom it shall be furnished. Requests shall not require more than 2 workdays of

advance notification if the Government representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (k) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *provided*, that the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the

Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(End of clause)

* * *

52.246-15 Certificate of Conformance.

As prescribed in 46.315, insert the following clause in solicitations and contracts for supplies or services when the conditions in 46.504 apply:

CERTIFICATE OF CONFORMANCE
(APR 1984)

(a) When authorized in writing by the cognizant Contract Administration Office (CAO), the Contractor shall ship with a Certificate of Conformance any supplies for which the contract would otherwise require inspection at source. In no case shall the Government's right to inspect supplies under the inspection provisions of this

contract be prejudiced. Shipments of such supplies will not be made under this contract until use of the Certificate of Conformance has been authorized in writing by the CAO, or inspection and acceptance have occurred.

(b) The Contractor's signed certificate shall be attached to or included on the top copy of the inspection or receiving report distributed to the payment office or attached to the CAO copy when contract administration (Block 10 of the DD Form 250) is performed by the Defense Contract Administration Services. In addition, a copy of the signed certificate shall also be attached to or entered on copies of the inspection or receiving report accompanying the shipment.

(c) The Government has the right to reject defective supplies or services within a reasonable time after delivery by written notification to the Contractor. The Contractor shall in such event promptly replace, correct, or repair the rejected supplies or services at the Contractor's expense.

(d) The certificate shall read as follows:

"I certify that on _____ [*insert date*], the _____ [*insert Contractor's name*] furnished the supplies or services called for by Contract No. _____ via _____ [*Carrier*] on _____ [*identify the bill of lading or shipping document*] in accordance with all applicable requirements. I further certify that the supplies or services are of the quality specified and conform in all respects with the contract requirements. Including specifications, drawings, preservation, packaging, packing, marking requirements, and physical item identification (part number),

and are in the quantity shown on this or on the attached acceptance document."

Date of Execution: _____
Signature: _____
Title: _____

(End of clause)

(R 7-104.100)

52.246-16 Responsibility for Supplies.

As prescribed in 46.316, insert the following clause in solicitations and contracts for (a) supplies, (b) services involving the furnishing of supplies, or (c) research and development, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may use the clause in such solicitations and contracts when the contract amount is not expected to exceed the small purchase limitation, and inclusion of the clause is authorized under agency procedures.

RESPONSIBILITY FOR SUPPLIES
(APR 1984)

(a) Title to supplies furnished under this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title.

(b) Unless the contract specifically provides otherwise, risk of loss of or damage to supplies shall remain

with the Contractor until, and shall pass to the Government upon –

(1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or

(2) Acceptance by the Government or delivery of the supplies to the Government at the destination specified in the contract, whichever is later, if transportation is f.o.b. destination.

(c) Paragraph (b) above shall not apply to supplies that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such nonconforming supplies remains with the Contractor until cure or acceptance. After cure or acceptance, paragraph (b) above shall apply.

(d) Under paragraph (b) above, the Contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

(End of clause)

(R 7-103.6 1968 JUN)

(R 1-7.102-6)